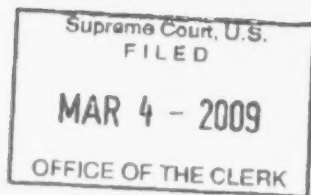


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No. 08-1027



In the  
SUPREME COURT OF THE UNITED STATES

ALLIANCE FOR COMMUNITY MEDIA, ET AL.

*Petitioners,*

v.

UNITED STATES OF AMERICA;  
FEDERAL COMMUNICATIONS COMMISSION

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Sixth Circuit

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BRIEF OF SUPPORTING RESPONDENTS  
NATIONAL LEAGUE OF CITIES, NATIONAL  
ASSOCIATION OF COUNTIES, AND UNITED  
STATES CONFERENCE OF MAYORS IN  
SUPPORT OF THE PETITION

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**RULE 29.6 STATEMENT**

No parent or publicly held company owns 10% or more of the National League of Cities, the National Association of Counties, or the United States Conference of Mayors.

## IDENTITY OF SUPPORTING RESPONDENTS

This brief is being filed in support of the Petition for Certiorari. The National League of Cities, the National Association of Counties, and the United States Conference of Mayors each participated as parties to the proceedings before both the United States Court of Appeals for the Sixth Circuit and before the Federal Communications Commission.

Each of the Supporting Respondents advocates on behalf of, and performs a variety of services for, local governments throughout the United States.

## ARGUMENT

The Supporting Respondents adopt the positions of the Petitioners as set for in the Petition for Certiorari. The Supporting Respondents also offer the following in support of the Petition.

In 1949, Chief Justice Vinson stated that one of this Court's limited functions is to "pass upon questions of wide import under the Constitution, laws, and treaties of the United States. . . ."<sup>1</sup> Further, this Court's Rules specifically provide that considerations affecting the decision to grant

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<sup>1</sup> Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi, cited in Robert L. Stern, Eugene Grossman, *et al* SUPREME COURT PRACTICE 220-21 (8th Ed. 2002)

certiorari include whether a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. *See*, S. Ct. R. 10 (c). This case presents exactly such questions, and is therefore deserving of this Court's attention.

**I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF THE EXTENT OF FEDERAL AGENCY JURISDICTION OVER LOCAL LAND USE DECISIONS**

As the Petition notes, this case involves the division of authority between federal, state, and local governments with respect to the regulation of cable services. This division of authority presents a critical question of federal law related to the federalism principles at the heart of our dual sovereign system of government.

At its most basic level, cable regulation involves land use regulation, in particular the granting through franchise agreements of access to public rights-of-way. The regulation of land use has long been recognized as a traditional state and local power, entitled to the utmost federal respect. *See FERC v. Mississippi*, 456 U.S. 742, 768, n. 30 (1982); *Hess v. Port Authority Trans Hudson Corporation*, 513 U.S. 30, 44 (1994). Allowing the Federal Communications Commission ("FCC") to deem franchises granted, and thereby grant federal

authorization for private entities to use local rights-of-way violates this principle.

It is also contrary to this Court's precedents. For example, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), this Court rejected the Government's expansive interpretation of "navigable waters" because it "result[ed] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. The FCC's interpretation of the word "unreasonably" similarly impinges state and local authority over land use.

Similarly, in *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006), this Court stated that giving the Corps of Engineers the jurisdiction to regulate wetlands not connected to navigable waters would result in "the Corps . . . function[ing] as a *de facto* regulator of immense stretches of intrastate land...." The Court noted that it would ordinarily expect a "clear and manifest" statement from Congress to authorize such an unprecedented intrusion into traditional state authority. See *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994).

In *Rapanos*, the phrase "the waters of the United States" failed to qualify as a clear and manifest statement of Congress's grant of such authority to the Corps. Likewise, when it enacted 47 U.S.C. § 621(a) (1), Congress did not intend to give the FCC broad authority over local land use

decisions or to grant the FCC jurisdiction to dictate the terms under which private companies can use and occupy public rights-of-way.

The importance of the question of federal agency authority over local land use decisions cannot be understated. The Supporting Respondents respectfully request that this Court grant certiorari to address this question.

## II. THE SIXTH CIRCUIT FAILED TO APPLY THIS COURT'S PRECEDENTS TO ITS INTERPRETATIONS OF 47 U.S.C. § 621

Courts only defer to agency interpretations of statutes that, applying the normal "tools of statutory construction," are found to be ambiguous. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-449 (1987), *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006). The tools of statutory construction include the statutory text itself, dictionaries, and legislative history. Further, undefined statutory terms are interpreted "in accordance with [their] ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), *S.D. Warren Co.*, 547 U.S. at 376 (2006).

In this case, the Sixth Circuit made no use of the tools of statutory construction to determine the *meaning* of the word "unreasonably." Instead of ascertaining the meaning of the word, the court of appeals surmised that because differing fact

patterns might result in certain franchise conditions being reasonable in one instance but not reasonable in another, the term "unreasonably" was ambiguous. That is not the proper analysis to be followed for determining the ambiguity of a statute.

The Supporting Respondents respectfully request this Court grant certiorari to provide guidance as to the proper analysis to be used when considering whether a statute is ambiguous.

### CONCLUSION

The Supporting Respondents respectfully request that this Court grant the Petition for Certiorari.

Respectfully Submitted,

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